Supreme Court, U. S.
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SUPREME COURT OF THE UNITES STATES
October Term, 1977
Docket No. 76-1519

In the Matter of ALFRED O. KUHNLE,

Appellant,

-against-

JOHN T. O'HAGAN, as Commissioner of the Fire Department of the City of New York and BOARD OF TRUSTEES OF THE NEW YORK CITY FIRE DEPARTMENT PENION FUND-ARTICLE 1.

Appellee.

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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Pursuant to Rule 16 of the Rules of this Court, the appellee moves to dismiss the appeal herein on the ground that it does not present a substantial federal question.

Question Presented

Are Sections 210 and 211 of the Retirement and Social Security Law, which permit only persons who have retired for reasons other than physical disability to hold a position in the public service without forfeiture of their pernsion allowances, unconstitutional?

Facts

On December 14, 1937, petitioner was appointed a fireman with the New York City Fire Department. He served in this position until July 9, 1959, when he was granted accident disability retirement.

On March 1, 1969, petitioner obtained employment with the Board of Education of the City of New York. On August 20, 1970, he was notified that in accordance with the provisions of the New York City Charter §1117 and Sections 210 and 211 of the Retirement and Social Security Law,*

*The charter and statute provide that a former City employee on pension may return to work for the state or local government provided, however, the pensioner had not retired because of disability.

his accident disability pension was suspended retroactive to March 1, 1969.

Effective September 1, 1974, the Executive Law was amended to bar discrimination in employment because of a physical disability. By letter dated September 19, 1974, petitioner's counsel wrote to the Fire Department for reinstatement of his pension as of September 1, 1974.

When the pension was not reinstated, petitioner filed a complaint with the New York State Division of Human Rights. The Division dismissed the complaint for lack of jurisdiction. In its Determination and Order after Investigation the State Division stated as its reasons for determining that it was without jurisdiction the following:

> "The alleged act of discrimination occurred on August 20, 1970 [the date appellant was notified of the suspension of his disability pension]. Under Section 286.10 [of the Executive Law] a complaint must be filed with the Division within one year after the occurrence of the alleged unlawful discriminatory practice.
>
> Also, the question of the complainant's disability predated September 1, 1974 at which time the Division had no jurisdiction.

The dismissal was affirmed by both the Human Rights Appeal Board and the Appellate Division, First Department, with one dissent in each case. On November 30, 1976, the Court of Appeals affirmed the order of the Appellate Division. 40 NY 2d 720.

Opinions Below

The Supreme Court, New York County (SAYPOL, J.), in a decision filed January 23, 1976, denied the application by the petitioner for judgment requiring the respondents to make payments under petitioner's

disability pension.

The Court found the statute constitutional as applied to the petitioner, holding that the "differentiation between the two classes of retirees bears a reasonable and just relation to a legitimate purpose" (citing cases) (Appendix B to Jurisdictional Statement at p. 9).

The judgment of the Supreme Court was affirmed by the Appellate Division of the New York Supreme Court on the opinion of the Supreme Court. 55 AD 2d 536 (1976). An appeal to the Court of Appeals was dismissed for want of a substantial constitutional question. 41 NY 2d 900 (1977).

ARGUMENT

THE FEDERAL CONSTITUTIONAL ISSUE RAISED ON THE APPEAL IS INSUBSTANTIAL. THERE IS NO DENIAL OF EQUAL PROTECTION OF THE LAW HERE. THE DISTINCTION MADE BY THE RETIREMENT AND SOCIAL SECURITY LAW BETWEEN PENSIONERS RETIRED FOR DISABILITY AND PENSIONERS RETIRED FOR SERVICE IS A REASONABLE ONE.

(1)

In 1964 the New York State Legislature enacted Sections 210 and 211 of the Retirement and Social Security Law. Subject to certain specified conditions, these sections permit service pensioners to accept public employment without loss of pension, but deny disability pensioners this benefit. The New York Courts properly held that the differentiation between the two classes of retirees bears a reasonable and just relation to a legitimate state purpose.

The appellant has focused his attack upon the fact that only a pensioner who has

retired for service may avail himself of the benefits conferred by the act. The New York State legislature chose not to permit a pensioner who was retired for disability to do so. The legislative classification, by itself, does not violate the equal protection clause.

> "It has been observed that there is hardly a law in the books that does not affect some people diffenently from others (see San Antonio School Dist. v. Rodriquez, 411 U.S. 1, 60 [concurring opn.]). Under traditional analysis, the equal protection clause does not deny to states the power to treat different classes of persons indifferent ways, but a classification must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. (Reed v. Reed, 404 US 71, 75-76; Neale v. Hayduk, 35 NY 2d 182, 186). A State does not violate the guarantee merely because the classifications made by the laws are imperfect (Dandridge v. Williams, 397 471, 485), and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (McGowan v. Maryland, 366 U.S. 420, 426; Matter of Dorn "HH" v. Lawrence "II", 31 NY

> 2d 154, 158)." Matter of Malpica-Orsini 36 NY 2d 568, 571, 331 N.E. 2d 486, 490 (1975).

The distinction drawn by the legislature between service pensioners and disability pensioners is a reasonable one. Service pensioners may retire because they have worked for a period of time sufficient to entitle them to their pension. Disability pensioners are entitled to their pensions because they were too ill to continue to work. The State may not wish to permit the disability pensioner to return to the public employ while continuing to hold a pension to which he is entitled on the premise that he is too ill to work. Moreover, the State, which wishes to encourage the pensioner who is physically fit to return to the public employ (see Sec. 211(2)(b)(2)), may not wish to encourage the disabled pensioner to do so.

By enacting Sec. 211, New York State assured itself of the availability of capable experienced personnel who might otherwise have been discouraged from returning to the public service because of the loss of their pension benefits. The entire scheme of the act indicates that it was designed to permit a pensioner who was in good health (Sec. 211(2)(b)(1)) and who possessed otherwise unavailable skills (Sec. 211(2)(b)(3)) to return to public employment and thereby supplement his income to the limit established by the statutory formula (Sec. 211(3)(a). As the New York Court of Appeals noted in the first appeal, Kuhnle v. Div. of Human Rights, 40 NY 2d 720, 722-723, 358 N.E. 2d 507, 509 (1976), the appellant, as a recipient of a disability pension received more than equal treatment. The pension he received

when he became disabled was one designed to meet his needs. It is a pension granted to the disabled despite their generally shorter periods of service anad smaller contributions to the pension fund. Depite the handicap, appellant was not barred from employment. In contrast, retirees on regular pensions have earned their benefits by longer years of service and greater contributions. Kuhnle, 40 NY 2d at p. 723, 358 N.E. 2d at p. 509. The Court of Appeals noted that the two pension programs and their respective conditions are not comparable. It concluded (40 NY 2d at p. 723, 358 N.E. 2d 509-510):

> "Each was designed to meet different needs; each contains conditions consistent with its own purpose. Therefore, it is neither irrational nor discriminatory for the State to limit the right to governmental employment while yet receiving a pension to those who are physically fit and to exclude those who are not to wit, those whose

retirement was based on disability. A program tailored to meet the unique needs of disabled employees is not to be deemed flawed merely because it is different from one designed for the nondisabled."

(2)

In support of his position, the appellant cites this Court's decisions in Geduldig v. Aiello, 417 U.S. 484 (1974), General Electric Co. v. Gilbert, 429 U.S. 125 (1976) and Califano v. Goldfarb, ____U.S.____, 97 S. Ct. 1021 (1977). Those cases are not contrary to our position. In each case, this Court applied the applicable rules where a statute is challenged on equal protection or statutory grounds. For example, in Califano, this Court held that a gender based distinction between widows and widowers in the social security survivor benefit's program violated due process and equal protection because there was no justi-

fication for the distinction. In the instant case, as we have shown above, the statutory classification of pensioners retired for disability and service pensioners is warranted because of the different purposes served by the two pension programs.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

August 19, 1977.

Respectfully submitted,

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